

## Update: Sexual Assault Benchbook

### Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

## CHAPTER 3

### Other Related Offenses

#### 3.16 Indecent Exposure

##### D. Pertinent Case Law

Insert the following language on page 162 after the last paragraph of Section 3.16, “**4. Consenting Audience No Defense; . . .**”

##### **5. Person Exposed Cannot Also Be Person Offended**

In a case of first impression, the Michigan Court of Appeals considered “[w]hether an ‘open exposure’ is effected if only the defendant witnesses the exposure . . . .” *People v Williams*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003). In *Williams*, the defendant entered the bathroom at a private residence where his 8-year-old niece was bathing. *Williams, supra* at \_\_\_. The defendant refused his niece’s request to leave the room, and he proceeded to draw a picture of the girl and included depictions of her vagina and breasts. *Williams, supra* at \_\_\_\_.

The district and circuit courts disagreed with the defendant that an “open or indecent exposure” could not occur in a private residence where all possible

observers were also actors in the alleged criminal conduct. *Williams, supra* at \_\_\_\_\_. Citing *Vronko, supra*, the Michigan Court of Appeals recognized that an “open exposure” need not actually be witnessed by another person, provided the exposure occurred in a public place under circumstances in which it was reasonable to expect another person to observe it. *Williams, supra* at \_\_\_\_\_. Notwithstanding *Vronko*, the Court decided that the language of the indecent exposure statute and the cases interpreting it could not justify a finding “that the test for whether a punishable open exposure occurred is whether the *person being viewed* might have been offended by his or her own exposure.” *Williams, supra* at \_\_\_\_ (emphasis in original).

## CHAPTER 6

### Specialized Procedures Governing Preliminary Examinations and Trials

#### 6.7 Special Protections For Victims and Witnesses While Testifying

##### D. Support Person

Replace the language in the cross-reference (designated with \*) on page 299 with the following sentence:

Effective May 1, 2003, amendments to the court rules added a subrule requiring notice of intent to use a support person or to request special arrangements restricting the view of the respondent/defendant in juvenile proceedings. MCR 3.922(E).

## 6.12 Victim Confidentiality Concerns and Court Records

### C. Juvenile Delinquency Cases

Replace the text in subsection (C) on page 311 with the following:

The amended court rules effective May 1, 2003, added a new section to the list of files defined as confidential and to which only persons with a legitimate interest have access. MCR 3.903(A)(3)(b) characterizes the contents of a juvenile's social file, including victim statements, as confidential. MCR 3.903(A)(3)(b)(vi).

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* in juvenile cases are open to the general public, while *confidential files* are not open to the public. MCR 3.903(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3)(a) defines "confidential files" as all materials made confidential by statute or court rule, including:

- : the separate statement about known victims of juvenile offenses as required by MCL 780.784, and
- : the testimony taken during a closed proceeding pursuant to MCR 3.925(A) and MCL 712A.17(7).

"Confidential files" may only be accessed by an individual the court determines has a legitimate interest in the files. MCR 3.925(D)(2). In determining whether a person has a legitimate interest, the court must consider:

- : the nature of the proceedings;
- : the public's welfare and safety;
- : the interest of the minor; and
- : any restriction imposed by state or federal law.

## CHAPTER 7

### General Evidence

#### 7.4 Selected Hearsay Rules (and Exceptions)

##### H. “Catch-All” Hearsay Exceptions— MRE 803(24) and MRE 804(b)(7)

Insert the following text on page 357 at the end of the text concerning *People v Katt*:

The Michigan Supreme Court disagreed with the defendant’s argument that statements coming close to admission under a specific hearsay exception but that do not quite fit within the exception are not admissible under the residual hearsay exception. (This is commonly referred to as the “near miss” theory.) *People v Katt*, \_\_\_ Mich \_\_\_ (2003).

The Court affirmed the defendant’s conviction and declined to apply the “near miss” theory. The Court stated:

“We agree with the majority of the federal courts and conclude that a hearsay statement is ‘specifically covered’ by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adoption the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24).” \_\_\_ Mich at \_\_\_.

## 7.14 Privileges Arising From a Marital Relationship

### C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

Replace the first paragraph on page 390 with the following paragraph:

Application of the amended marital communications privilege to introduce communication that occurred between a defendant and a prosecution witness, the defendant's ex-husband, while the parties were still married but before the amendment's effective date, did not violate the *ex post facto* clauses of the United States and Michigan Constitutions. *People v Dolph-Hostetter*, \_\_\_ Mich App \_\_\_, \_\_\_ (2003). *Dolph-Hostetter* is the first Michigan appellate court ruling involving a defendant's challenge to the retroactive application of the amended marital communications privilege in MCL 600.2162.

Insert the following paragraphs at the end of Section 7.14(C) on page 391:

Initially, the Michigan Supreme Court remanded *Dolph-Hostetter, supra*, to the Michigan Court of Appeals and directed the Court to "address the *ex post facto* issue presented in [*Dolph-Hostetter*] in light of *Carmell v Texas* [citations omitted]." *People v Dolph-Hostetter*, 466 Mich 883 (2002). In *Dolph-Hostetter*, the defendant, the defendant's ex-husband (Ronald Hostetter), and a third individual were arrested in 2000 for their involvement in a 1996 murder. *Dolph-Hostetter, supra* at \_\_\_. The defendant and Hostetter were married at the time of the murder but had divorced in 1997 before they were arrested.

In an agreement to provide testimony against the defendant and the third individual, Hostetter pleaded guilty to second-degree murder. *Dolph-Hostetter, supra* at \_\_\_. The circuit court agreed with the defendant that retroactive application of the amended marital communications privilege in MCL 600.2162(7) would violate the prohibition against *ex post facto* laws, and the court excluded Hostetter's testimony. *Dolph-Hostetter, supra* at \_\_\_. As instructed, the Michigan Court of Appeals considered the *ex post facto* issue in light of *Carmell, supra*, and reversed the circuit court's ruling.

*Carmell* involved the expansion of an age-based exception to a Texas law requiring that a child-victim's allegations of a sex offense be corroborated. For the same reasons emphasized by the United States Supreme Court in *Carmell, supra*, 529 US at 530-532, the Michigan Court of Appeals concluded that retroactive application of the amended Texas statute violated the prohibition against *ex post facto* laws, but retroactive application of Michigan's amended marital communications privilege did not constitute an *ex post facto* violation. *Dolph-Hostetter, supra* at \_\_\_. The Texas law was a clear violation of the prohibition against *ex post facto* laws because "[the

statute] essentially lowered the quantum of proof necessary to convict the accused.” *Dolph-Hostetter, supra* at \_\_\_\_\_. According to the Court, the statutory amendment at issue in Michigan was dissimilar to the *Carmell* amendment in that “[t]he amendment to the marital communications privilege does not alter the quantum of evidence necessary to convict a person of any crimes; it simply affects which evidence may be introduced at a criminal trial.” *Dolph-Hostetter, supra* at \_\_\_\_\_.

The *Dolph-Hostetter* Court explained that the change in evidence under MCL 600.2162(7) was limited to the quantum of evidence *admissible* without the defendant’s consent; the amendment had no effect on a defendant’s presumptive innocence and the amount of evidence necessary to overcome that presumption. *Dolph-Hostetter, supra* at \_\_\_\_\_. “The amended statute only renders witnesses competent to testify, if they choose, or permits the admission of evidence that previously was inadmissible. It does not make criminal any prior action not criminal when done; it does not increase the degree, severity or nature of any crime committed before its passage; it does not increase punishment for anything done before its adoption; and it does not lessen the amount or quantum of evidence that is necessary to obtain a conviction when the crime was committed.” *Dolph-Hostetter, supra* at \_\_\_\_\_.